United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-2245

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST FRANCIS,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Docket No.
74-2245

B
P/S

BRIEF FOR PETITIONER AND APPENDIX

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UNITED STATES COURT OF APPEALS
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ERNEST FRANCIS, :

Petitioner, : Docket No. 74-2245

-against- :

IMMIGRATION AND NATURALIZATION SERVICE, :

Respondent. :

BRIEF FOR PETITIONER AND APPENDIX

PRELIMINARY STATEMENT

This is an appeal from a decision of the Board of Immigration Appeals dated August 15, 1974, pursuant to Immigration and Nationality Act §106(a), 8 U.S.C. §1105(a). On September 23, 1974, petitioner filed a timely Petition for Review of Deportation Order with this Court.

ISSUES PRESENTED

Petitioner, a permanent resident of the United States for more than seven years asserts that he is eligible for discretionary relief pursuant to Immigration and Nationality Act, (hereinafter cited as INA), §212(c), 8 U.S.C. §1182(c) despite the fact that he remained in the United States after his conviction for possession of marijuana. If it is determined that petitioner is not statutorily eligible for discretionary relief pursuant to INA § 212(c), petitioner asserts that INA §212(c) violates his Fifth Amendment equal protection right because it denies him an opportunity to request discretionary relief only because he remained in the United States after his conviction.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition Below.

Under the Immigration and Nationality Act a legal

permanent resident of the United States who has been convicted of a marijuana related offense is excludable or deportable from the United States. However, under present administrative interpretation of Section 212(c) of the Immigration and Nationality Act a permanent resident of more than seven years who has been convicted of such an offense and who has left the United States after his conviction may request discretionary relief to continue domicile in the United States in an exclusion proceeding. Such a person who has left and returned to the United States after his conviction without initiation of an exclusion proceeding may also request such discretionary relief in a deportation proceeding. But a permanent resident of more than seven years who has been convicted of a marijuana related offense and who has remained in the United States after his conviction is barred from seeking discretionary relief. Petitioner asserts that this is an erroneous interpretation of INA §212(c) and that he is statutorily eligible to apply for discretionary relief pursuant to that statute. If it is determined that he is not statutorily eligible to apply for discretionary relief pursuant to INA §212(c), petitioner asserts that INA §212(c) violates his Fifth Amendment equal protection right because it denies him an opportunity to request discretionary relief only because he remained in the United States after his conviction.

In an oral decision on February 20, 1974, by Immigration Judge Francis J. Lyons in New York, New York, petitioner was denied an opportunity to apply for discretionary relief pursuant to Immigration and Nationality Act (INA) §212(c), 8 U.S.C. 1182(c) and ordered deported to Jamaica pursuant to INA §241(a)(11), 8 U.S.C. §1251(a)(11). In a decision dated August 15, 1974, the Board of Immigration Appeals agreed with the immigration judge's decision and dismissed the petitioner's appeal. On September 23, 1974, petitioner filed a timely Petition for Review of Deportation Order with this Court.

B. Statement of Facts.

Petitioner has been a legal permanent resident of the United States for fourteen years. He entereed the United States as a permanent resident in September, 1961 and has never left the United States since that date. He is married to a U.S. citizen and has a U.S. citizen child, Angelina Francis age 9. He resides with his wife and child in Bronx, New York, and supports his family by working as a handy man. Petitioner's father, Joseph Francis, now deceased, was a U.S. citizen. Petitioner has three U.S. citizen brothers, Walter Francis, Bert Francis, Urie Francis, and one U.S. citizen sister, Shirley Francis; all of whom reside in Bronx, New York.

On October 20, 1971, in New York, New York, petitioner was convicted of criminal possession of dangerous drugs in the

sixth degree (marijuana), a misdemeanor, New York Penal Law §220.05 [repealed 1973 replaced by New York Penal Law §220.03 (McKinney 1974-75 Pocket Part)], and sentenced to probation. He had no prior and no subsequent arrests or convictions, except a twenty-five dollar fine for gambling in September, 1973.

Petitioner requests eligibility to apply for discretionary relief pursuant to INA §212(c) to allow him to remain in the United States with his family.

C. Statutory Provisions

The Immigration and Nationality Act, Section 241(a)(11), 8 U.S.C. 1251 (a)(11), provides in relevant part:

> Any alien in the United States...shall, upon the order of the Attorney General, be deported who -
> ...at any time has been convicted of a violation of ...any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana.

The Immigration and Nationality Act, Section 212(a)(23), 8 U.S.C. 1182 (a)(23), provides in relevant part:

> [T]he following class of aliens...shall be excluded from admission into the United States:
> Any alien who has been convicted of a violation of, or conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana...

Section 212 (c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), states:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a).

ARGUMENT

POINT I

A PERMANENT RESIDENT OF MORE THAN SEVEN YEARS WHO HAS REMAINED IN THE UNITED STATES AFTER CONVICTION FOR POSSESSION OF MARIJUANA IS STATUTORILY ELIGIBLE TO APPLY FOR DISCRETIONARY RELIEF PURSUANT TO IMMIGRATION AND NATIONALITY ACT § 212(c).

Statutory eligibility to apply for discretionary relief has been recognized as a judicially protectable right. Eligibility for discretionary relief does not compel the granting of the relief requested, but it does give the alien the right to have his case considered i.e., he has the right to demand that discretion be exercised as to whether to grant the relief requested. U.S. ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954); Asimakopoulos v. I.N.S., 445 F. 2d 1362, (9th Cir., 1971). Petitioner does not ask this court to grant him discretionary relief, but asks only that he be deemed

statutorily eligible for discretionary relief pursuant to INA §212(c) and be given an opportunity to apply. Petitioner does not seek this opportunity frivolously. Pursuant to the criteria used to determine whether §212(c) discretion will be granted, petitioner's request for discretion will most likely be granted if he is deemed eligible to apply for such relief. The following factors are taken into consideration: an applicant's relationship to U.S. citizens and permanent residents, whether the applicant's family will suffer hardship if he is forced to leave the United States, the seriousness of the offense committed and the alien's record before and after the conviction. Matter of G---A---, 7 I&N Dec. 274 (1956); Matter of F---, 6 I&N Dec. 537 (1955). Petitioner has a U.S. citizen wife and child whom he supports and who would suffer severe economic and emotional hardship if he were forced to leave the United States. He also has three U.S. citizen brothers and one U.S. citizen sister. Petitioner was convicted of possession of a small amount of marijuana, a misdemeanor. He had no arrests or convictions prior or subsequent to that conviction except for a twenty-five dollar gambling fine. Petitioner's case is specifically similar to Matter of G-----A-----, 7 I&N Dec. 274 (1956). G---- A----- was convicted of a much more serious marijuana related offense, importation of marijuana, in violation of

26 U.S.C. 3234 (a) (1946 ed.), a felony, and had another arrest for intoxication. However he had a permanent resident wife and U.S. citizen children; §212(c) discretionary relief was granted him in a deportation proceeding.

A permanent resident may apply for discretionary relief under §212(c) in both an exclusion and a deportation proceeding, 8 C.F.R. §212.3. Matter of G----A-----, supra, Matter of S------, 6 I&N Dec. 392 (1954). However, under present administrative interpretation to be eligible for such relief in a deportation proceeding, the permanent resident must have left the United States and re-entered after his conviction. Matter of Arias-Uribe, 13 I&N Dec. 696 (1971). If petitioner had departed from the United States afther his conviction and was now seeking re-entry into this country, he would be eligible for discretionary relief in an exclusion proceeding. If petitioner had departed from, and then re-entered the United States after his conviction, he would be eligible for discretionary relief in a deportation proceeding. Your petitioner is not eligible to apply for discretionary relief only because he remained in the United States.

Petitioner asserts that the above interpretation of the statute is erroneous. The precursor to INA §212(c) was the Seventh Proviso to section 3 of the Immigration Act of

1917 which provided "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe." 39 Stat. 874.

Relief under the Seventh Proviso was available in deportation as well as exclusion proceedings. If the alien had left and re-entered the U.S. after the act for which he was deportable, Seventh Proviso relief was granted. Matter of L----, 3 I&N Dec. 767 (1949). Seventh Proviso relief was also available in deportation proceedings when the alien had not left and re-entered this country. The Board of Immigration Appeals determined that a contrary decision would result in "capricious" and "absurd" consequences as "chance might be the factor determining substantive rights." Matter of A---, 2 I&N Dec. 459 at 461-2(1946). In such a case deportation proceedings were withdrawn and the alien was granted advance permission to re-enter the United States. Matter of A----, supra, at 463.

The legislative history of section 212(c) does not express any objection to 212(c) discretionary relief being given in deportation proceedings. The Board of Immigration Appeals itself recognized there was no Congressional intent to change the practice under the Seventh Proviso and preclude

the exercise of §212(c) relief in a deportation proceeding as versus an exclusion proceeding and the administrative regulations so provide. Matter of S---, 6 I&N Dec. 392 (1954); Matter of F---, 6 I&N Dec. 537 (1955); 8 C.F.R. §212.3. The Board reaches the absurd result, however, of requiring that an alien must have left and re-entered the U.S. after his conviction before §212(c) relief can be given in a deportation proceeding. Matter of Arias-Uribe, 13 I&N Dec. 696 (1971).* The purpose of §212(c) is to give discretionary relief when appropriate and prevent hardship.

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* The Ninth Circuit in a per curiam decision affirmed the Board's decision. Arias-Uribe v. I.N.S. 466 F 2d. 1198 (1972). That court, however, did not consider the case in view of the history of the statute. The court stated that because a person convicted of a narcotics offense could not be granted voluntary departure, he could not be eligible for §212(c) relief. The court was apparently unaware that under the Seventh Proviso a person who could not be granted voluntary departure was eligible for §212(c) relief because the practice was to withdraw the deportation proceedings when it was determined that discretionary relief should be exercised in favor of the alien. Matter of B---, 1 I&N Dec. 204 (1942); Matter of A---, 2 I&N Dec. 459 (1946). The court was further in error when it stated that Matter of G---A---, 7 I&N Dec. 274 (1956), was not in point because in that case the alien was deportable because he was excludable at the time he entered the U.S. Deportation was sought in Matter of G---A--- on the basis of a conviction for a marijuana related offense, INA §241 (a)(11), 8 U.S.C. § 1251 (a)(11), the same basis on which deportation of petitioner is sought.

Senate Report 1137 p. 12 (82nd Cong. 2d Sess.) (1952); House Report, 1365 p. 51 (82nd Cong. 2d Sess.) (1952); Senate Report 352 p. 6 (64th Cong. 1st Sess.) (1916); Senate Report 355 p. 6 (63rd Cong. 2d Sess.) (1914).

In light of such a purpose, it is wholly irrational to presume that Congress intended to deny an oppotunity to apply for §212(c) relief to a person whose bonds to the United States were so great that he did not leave this country while granting such an opportunity to one who left the United States and is now seeking to re-enter. It is also absurd to presume that Congress intended eligibility for such an important benefit, relief from banishment from home, country and family, to turn on a fluke that the permanent resident alien happened, for instance, to have taken a weekend trip to Montreal, Canada. An interpretation more in keeping with logic and the purpose of the act would be to hold that the practice under the Seventh Proviso as in Matter of A---, 2 I&N Dec. 459, 463 (1946), in which deportation proceedings were withdrawn when it was determined that §212(c) relief should be given to an alien was not changed by the enactment of §212(c) and is still in effect.

The legislative history of §212(c) clearly demonstrates

that the changes made in the Seventh Proviso were directed at other administrative interpretations.

In Matter of H----, 1 I&N Dec. 166 (1942) it was determined that the Seventh Proviso applied to aliens who had illegally entered the United States and subsequently acquired seven years domicile. A subsequent decision determined that an alien who had never had legal residence in the United States and was deported after seven years could apply for Seventh Proviso relief when he sought some time after his deportation to re-enter the United States on the theory that the deportation in and of itself did not operate to terminate his domicile in the United States, Matter of S---, 1 I&N Dec. 646 (1944).

It was further determined that an alien who had been deported before the expiration of seven years from date of entry into the United States was eligible for Seventh Proviso relief when he sought to enter the U.S. after his deportation on the theory that the entire seven-year period need not be spent in the United States provided that the absence although at the end of the seven-year period was a genuine temporary departure. Matter of M---, 4 I&N Dec. 82 (1950).

Congress in enacting §212(c) was seeking to limit discretionary relief to persons who were in the status of legal permanent residents. A person who had been deported

and is outside the United States would not at that point be a lawful permanent resident because any status he had in the United States would have been terminated by the effectuation of the deportation order. Both the Senate and House Reports support this view as they both stated:

> Under present law, in the case of an alien returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years, he may be admitted in the discretion of the Attorney General under such circumstances as the Attorney General may prescribe. Under existing law the Attorney General is thus empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States. The comparable discretionary authority vested in the Attorney General in section 212(c) of the bill is limited to cases where the alien has been previously admitted for lawful permanent residence and has proceeded abroad voluntarily and not under the order of deportation.
>
> Senate Report 1137 p. 12 (82nd Cong. 2d Sess.) (1952); and House Report 1365 p. 51 (82nd Cong. 2d Sess.) (1952).

The above interpretation of the statute is more logical and more in keeping with the basic purpose of the act, to allow discretionary relief where appropriate and prevent hardship. However, if there are any doubts as to the proper construction of the statute, they must be resolved favor of the alien. A unanimous Supreme Court decision in Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) stated:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. Delgadillo v. Carmichael, 332 U.S. 388, 68 S. Ct. 10, 92 L. Ed. 17. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

cf. Rosenberg v. Fleuti, 374 U.S. 449, 458-9 (1963).

POINT II

IF A PERMANENT RESIDENT OF MORE THAN SEVEN YEARS WHO REMAINED IN THE UNITED STATES AFTER CONVICTION FOR POSSESSION OF MARIJUANA IS NOT ELIGIBLE TO APPLY FOR DISCRETIONARY RELIEF PURSUANT TO INA § 212(c), SECTION 212(c) VIOLATES PETITIONER'S FIFTH AMENDMENT EQUAL PROTECTION RIGHT.

Under present administrative interpretation a permanent resident alien is eligible for §212(c) discretionary relief in an exclusion proceeding if he has left the United States and is seeking entry or in a deportation proceeding if he had left the United States and re-entered after a conviction. (See Brief, supra, pp. 8-10.). Permanent resident aliens, like petitioner, who remained in the United States are denied an opportunity to apply for such

relief. If petitioner had had such unimportant ties to this country that he left the United States after his conviction and was now seeking re-entry, he would be eligible for §212(c) relief. If petitioner had by some chance taken a weekend trip to Canada after his conviction, he would be eligible for §212(c) relief. Petitioner is denied eligibility for §212(c) relief only because he remained in the United States after his conviction. If the above is a proper construction of §212(c), the statute violates petitioner's Fifth Amendment equal protection right.*

In its most recent pronouncements in the immigration field the Supreme Court has emphatically held that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution" and that in the immigration area, as in any other, "a resolute loyalty to constitutional safeguards" is required. Almeida-Sanchez v. United States, 413 U.S. 266, 272, 273, and 275 (Mr. Justice Powell, concurring), (1973); United States v. Brignoni-Ponce, ---U.S.---, 45 L. Ed. 2d 607, 614 (1975). The Supreme Court has also recently

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* The Supreme Court has recently confirmed that the scope of equal protection principles of the Fifth Amendment's Due Process Clause is equivalent to that of the Fourteenth Amendment's Equal Protection Clause. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975); Johnson v. Robison, 415 U.S. 361, 364 n. 4 (1974).

instructed that the determination of the constitutionality of an Act of Congress subject to an equal protection challenge must be made in light of the actual purpose of Congress. Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974).

The actual and obvious purpose of §212(c) was to allow discretionary relief where appropriate to legal permanent residents of more than seven years and prevent hardship. (See Brief, supra, pages 10-11, 12-13.) There is no rational reason to deny eligibility to a permanent resident of the United States of more than seven years merely because he never left the United States. Indeed, a person who never left the United States and his family show greater ties to life in this country and would be most likely to suffer severe hardship by the forced departure of the alien member.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Board of Immigration Appeals dismissing Petitioner's appeal and should determine that Petitioner is statutorily eligible to apply for discretionary relief pursuant to INA §212(c) or in the alternative that

INA §212(c) violates Petitioner's Fifth Amendment Equal Protection Right.

Respectfully submitted,

NY NY
November 26, 1975.

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No.: A 12 081 215 - New York February 20, 1974

In the Matter of :)

ERNEST FRANCIS) in Deportation Proceedings

- Respondent -)

CHARGE: I & N Act - Section 241(a)(11) violation of law relating to possession of dangerous drug - 6th degree in violation of Section 220.05 of the New York State Penal Law.

APPLICATION: None

In Behalf of Respondent:	In Behalf of Service:
Julius C. Bierviliet, Esq.,	Allan A. Blagar, Esq.,
Legal Aid Society	Trial Attorney
New York, N. Y.,	New York, N. Y.
11 Park Place	

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 54 year old male alien a native and citizen of Jamaica who last entered the United States on September 7, 1961 at which time he was admitted as a permanent resident.

On October 20, 1971 he was convicted in Supreme Court, Bronx County for violation of New York State Penal Law, criminal possession of dangerous drugs in the 6th degree (marijuana) in violation of Section 220.05 of that law. That is, what formerly was Section 220.05 is now Section 220.03, simple possession of marijuana. Respondent has not been absent from the United States since his original entry. He concedes deportability on the charge set forth in the order to show cause and as amended by the statement of additional charges. Although he concedes deportabilit

and acknowledges the unavailability to him of any form of discretionary relief under the present construction of the law, he wishes to present that question to the Board. He seeks to raise a constitutional objection in this proceeding insofar as the operation of Section 212(c) of the Act precludes an application for relief although, were respondent coming from a foreign port or place at the present time, and proceeding under Section 236 rather than Section 242, he would as a person returning to an unrelinquished domicile and be eligible to make application for relief under Section 212(c). However, that question is not one which can be resolved by me. The only decision I can enter is one of deportation.

ORDER: IT IS ORDERED that respondent be deported from the United States to Jamaica on the charge contained in the Order to Show Cause.

FRANCIS J. LYONS
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

AUG 15 1974

File: A12 081 215 - New York

In re: ERNEST FRANCIS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Julius C. Biervliet, Esquire
11 Park Place
New York, New York 10803

CHARGES:

Order: Section 241(a)(11), I&N Act (8 U.S.C. 1251 (a)(11)) - convicted of a violation of any law or regulation relating to the illicit possession of marijuana.

APPLICATION: None

The immigration judge, in an order dated February 20, 1974, found the respondent deportable as charged and ordered his deportation to Jamaica. The respondent appeals. The appeal will be dismissed.

The record relates to a 54 year old male alien, a native and citizen of Jamaica, who was admitted to the United States as a permanent resident on September 8, 1961.

A12 081 215

The immigration judge found the respondent deportable as charged by virtue of a conviction on October 20, 1971 for criminal possession of dangerous drugs in the sixth degree (marijuana). We agree with the immigration judge that deportability has been established by clear, convincing and unequivocal evidence.

Under section 241(a)(11) of the Immigration and Nationality Act, a conviction of an alien, at any time after entry, for a violation of any law or regulation relating to the illicit possession of marijuana, renders the alien deportable. The respondent's conviction falls squarely within the terms of section 241(a)(11). Because of this conviction, the respondent is not eligible at this time for any form of discretionary relief from deportation.

We agree with the immigration judge that deportation proceedings, rather than exclusion proceedings, were properly instituted. The respondent is not eligible to apply for relief under section 212(c) of the Immigration and Nationality Act.

ORDER: The appeal is dismissed.

Chairman

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COPY RECEIVED
Thomas J. Cahill
UNITED STATES ATTORNEY

11/26/75

1 - AUSA Alley

1 - JPS